

Message Text

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67

ACTION ARA-10

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FM AMEMBASSY QUITO

TO SECSTATE WASHDC 5893

LIMITED OFFICIAL USE QUITO 4068

E.O. 11652: N/A

TAGS: AFIN, OEXC, PDIP

SUBJECT: BINATIONAL (FULBRIGHT) COMMISSION SOCIAL SECURITY PAYMENTS

REF: A) QUITO 3734 (6/5/74)

B) STATE 127010 (6/14/74)

C) QUITO 4293 (6/26/74)

1. FULBRIGHT COMMISSION ECUADOREAN EMPLOYEES WERE NOT ENROLLED IN ECUADOREAN SOCIAL SECURITY (IESS) FROM OCTOBER OF 1958 TO DECEMBER OF 1966. WHEN THEY WERE ENROLLED IN 1967, THE IESS DEMANDED PAYMENTS TO COVER THE UN-ENROLLED PERIOD, PLUS INTEREST, PLUS A FINE FOR NOT HAVING ENROLLED THEM. AFTER UNSUCCESSFUL EMBASSY EFFORTS TO HAVE THE INTEREST AND FINE ELIMINATED, THE DEPARTMENT AUTHORIZED (REF B) EMBASSY TO PAY THE INTEREST, BUT TO TRY TO NEGOTIATE AN ELIMINATION OF THE "FINE" ON GROUNDS THAT THE USG (I.E., A DIPLOMATIC REPRESENTATION) CANNOT BE FINED UNDER STANDARD DIPLOMATIC PRACTICE.

2. DURING THE PAST YEAR, THE EMBASSY HAS SOUGHT THROUGH A VARIETY OF MEANS TO HAVE THE FINE REMOVED. FOLLOWING CONSULTATIONS AMONG THE DIRECTORS OF THE FULBRIGHT COMMISSION, SOUNDINGS WERE TAKEN WITH MEMBERS OF THE CONSEJO SUPERIOR OF THE IESS (THE GOVERNING BODY OF THE LIMITED OFFICIAL USE

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ECUADOREAN SOCIAL SECURITY INSTITUTE). WHEN THESE

PRODUCED NEGATIVE RESULTS, THE EMBASSY DISCUSSED THE MATTER WITH THE PRESIDENT OF THE ECUADOREAN SUPREME COURT, DR. CARLOS ANIBAL JARAMILLO (WHO IS A LEADING MEMBER OF THE IESS' CONSEJO SUPERIOR, AND WHO WOULD HAVE AN IMPORTANT SAY SHOULD THE MATTER BE FOUGHT THROUGH LEGAL, RATHER THAN DIPLOMATIC, MEANS). JARAMILLO'S VIEW WAS, IN EFFECT, "NO WAY"; THAT THERE WAS NO PROVISION IN THE LAW FOR ANY EXCEPTION (TO THE FINES) TO BE GIVEN TO ANY ORGANIZATION.

3. EMBASSY'S REACTION, HAVING DRAWN A BLANK AT THE IESS (WHICH PREDICTABLY HAD DEFENDED ITS INSTITUTIONAL INTERESTS), WAS TO TAKE THE MATTER UP WITH THE LEGAL ADVISER'S OFFICE AT THE FOREIGN MINISTRY. EMBASSY WAS ADVISED TO COMMIT ITS VIEWS TO PAPER AND FORWARD THEM TO THE FOREIGN MINISTRY, WHICH COULD THEN RAISE THE SUBJECT WITH THE IESS. THIS THE EMBASSY DID, SENDING A NOTE TO THE FOREIGN MINISTRY ON MARCH 20, 1975, EXPLAINING THE BACKGROUND TO THE PROBLEM, AND ASKING THE MINISTRY'S INTERVENTION IN RESOLVING THE DISPUTE WITH THE IESS. OPERATIVE POINTS IN THE EMBASSY'S NOTE WERE A) THE FULBRIGHT COMMISSION HAD NOT ENROLLED ITS EMPLOYEES IN THE IESS BECAUSE THEY WERE CONSIDERED TO BE PART OF THE USG MISSION IN ECUADOR AND THEREFORE EXEMPT FROM CONTRIBUTING TO SOCIAL SECURITY; B) THE USG HAD, HOWEVER, MADE THE BACK PAYMENTS AS A VOLUNTARY GESTURE OF GOOD WILL TOWARD THE IESS; C) BUT THE USG "DOES NOT ACCEPT THE PRINCIPLE THAT IT CAN BE 'FINED' FOR NOT HAVING MADE A PAYMENT WHICH IT WAS NOT LEGALLY OBLIGED TO MAKE IN THE FIRST PLACE, AND WHICH IT HAS SINCE PAID VOLUNTARILY AS AN INDICATION OF GOOD FAITH".

4. EMBASSY HAS NOW RECEIVED A REPLY FROM THE MINISTRY OF FOREIGN AFFAIRS. THE MINISTRY'S NOTE, DATED 21 MAY 1975, INDICATES THAT THE MINISTRY PASSED THE EMBASSY'S NOTE TO THE IESS FOR A REPLY, AND THE IESS REPLY (PREDICTABLY) REAFFIRMED THE IESS POSITION. THE SUBSTANTIVE PARAGRAPH IN THE MINISTRY'S NOTE READS AS FOLLOWS:

5. "THE ECUADOREAN SOCIAL SECURITY INSTITUTE, IN REPLY LIMITED OFFICIAL USE

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TO THE NOTE REFERRED TO, HAS INFORMED THIS MINISTRY THAT UNFORTUNATELY ARTICLE 13 OF SUPREME DECREE 1212 OF SEPTEMBER 1966 EXPRESSLY PROHIBITS THE REMISSION OF BOTH INTEREST AND FINES, AND ADDS THAT THE INSTITUTE, IN STRICT OBEDIENCE TO EXPRESS LEGAL PROVISIONS, HAS TO ENFORCE PAYMENT OF INTEREST AND TO IMPOSE A FINE, BECAUSE OF THE EMPLOYER'S DELINQUENCY, NOT ON THE PART OF THE UNITED STATES GOVERNMENT, BUT RATHER ON THE

AGENCY THAT FAILED TO DISCHARGE ITS OBLIGATIONS AS AN EMPLOYER, SUCH OBLIGATIONS BEING ESTABLISHED BY ECUADOREAN LAWS AND THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS.

"IN THIS MANNER, THE MINISTRY OF FOREIGN RELATIONS CONSIDERS THAT IT HAS ATTENDED TO THE REQUEST PUT FORWARD BY THE EMBASSY OF THE UNITED STATES OF AMERICA, AND TAKES THIS OPPORTUNITY TO RENEW TO THE EMBASSY EXPRESSIONS OF ITS HIGHEST AND MOST DISTINGUISHED &C."

6. OUR RECOMMENDATION WOULD BE TO SEND ANOTHER NOTE TO THE FOREIGN MINISTRY THANKING THEM FOR CONVEYING IESS' VIEWS, BUT POINTING OUT THAT THE US GOVERNMENT HOLDS THAT UNDER CONVENTIONAL DIPLOMATIC PRACTICE IT CANNOT BE FINED, AND THE FINE THE IESS SEEKS TO LEVY ON THE "BINATIONAL COMMISSION" WOULD IN FACT BE A FINE AGAINST THE USG, SINCE THE USG FUNDS THE FULBRIGHT PROGRAM. FURTHERMORE, THAT THE USG WAS ACQUANINTED WITH THE IESS VIEWS, SINCE THE US EMBASSY HAD TIRED TO RESOLVE THE MATTER IN DIRECT DEALINGS WITH THE IESS. THE IESS INSISTING ON ITS POINT OF VIEW, THE US EMBASSY THEREFORE HAS NO RECOURSE BUT TO AGAIN ASK THE MINISTRY OF FOREIGN AFFAIRS TO INFORM THE IESS THAT THE USG HAS VOLUNTARILY MADE THE BACK PAYMENTS AS A SIGN OF GOOD FAITH, AND THAT IT FURTHER AGREED TO PAY INTEREST ON THEM -- ALTHOUGH IT WAS NOT LEGALLY OBLIGED TO DO EITHER. THE USG DOES NOT, HOWEVER, ACCEPT THAT IT CAN BE "FINED", LEAST OF ALL FOR NOT HAVING DONE SOMETHING IT DID NOT HAVE TO DO.

7. EMBASSY NOTES THAT THE EUCADOREANS HAVE ON SEVERAL OCCASIONS REFERRED TO "THE PROVISIONS OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS" AS JUSTIFYING THEIR LIMITED OFFICIAL USE

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POSITION. WE DO NOT DISCOVER ANY SUCH JUSTIFICATION IN THE VIENNA CONVENTION, AND IN FACT, THE DEPARTMENT'S REPORT ON THE VIENNA CONFERENCE (DEPARTMENT OF STATE PUBLICATION 7289) EXPLICITLY SAYS "THE CONVENTION CONTAINS NO ARTICLE ON THE APPLICABILITY OF SOCIAL SECURITY PROVISIONS TO EMPLOYEES OF A MISSION WHO ARE NATIONALS OR PERMANENT RESIDENTS OF THE RECEIVING STATE" (P. 19). WE BELIEVE THIS MAY ALSO BE WORTH CALLING TO THE ECUADOREANS' ATTENTION.

8 REQUEST INSTRUCTIONS.
HEMENWAY

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